

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim by the decedent's surviving spouse for death benefits under K.S.A. 2004 Supp. 44-510b. On July 6, 2004, the decedent sustained a work-related injury that resulted in his death. In the October 3, 2006, Award, Judge Barnes found in summary:

- (1) at the time of his accident the decedent was an employee of Remodeling by David, which was performing remodeling work for Super 8 Motel, but he was not a statutory employee of Super 8 Motel Corporation;
- (2) Remodeling by David did not have workers compensation insurance coverage for the date of accident and the company is insolvent;
- (3) the Workers Compensation Fund is responsible for all the benefits payable in this claim; and
- (4) the decedent's average weekly wage on the date of accident was \$620, which included \$340 in base wages and \$280 for lodging.

Judge Barnes awarded decedent's surviving spouse death benefits, the payment of burial expenses and the payment of medical expenses that the decedent incurred due to his July 6, 2004, accident.

The Fund initiated this appeal. It contends the Judge erred by including the value of lodging in computing decedent's average weekly wage. The Fund argues the lodging did not constitute an economic benefit to the decedent. Accordingly, the Fund contends decedent's average weekly wage was only \$340, which would reduce the weekly compensation rate of death benefits.

Super 8 Motel Corporation and its insurance carrier contend the Judge's assessment of benefits and costs against the Fund and the Judge's determination of the average weekly wage should be affirmed. They, however, request reimbursement of court reporter expenses they have paid in this claim.

Guadalupe Perez Bucio, decedent's surviving spouse, contends the Award should be affirmed. She argues the motel room constituted an economic benefit to her husband as he did not have to pay for the room or obtain other lodging at his own expense.

The only issues before the Board on this appeal are:

1. What is the decedent's average weekly wage?

2. Are Super 8 Motel Corporation and its insurance carrier entitled to reimbursement of court reporter expenses they paid in this claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The decedent was hired by Cardenal Guarneros, who was a foreman or supervisor for Remodeling by David, to perform remodeling work under a contract between Remodeling by David and Super 8 Motel. On July 6, 2004, the decedent was installing insulation in the ceiling of a room that housed a swimming pool at the Super 8 Motel in Winfield, Kansas. While performing that work, the decedent fell approximately 17 feet from the ceiling into the unfilled swimming pool. After being hospitalized for his injuries, the decedent died on July 13, 2004, as a result of those injuries.

The primary issue on this appeal is the decedent's average weekly wage at the time of his accident – specifically, whether the value of lodging should be included in computing that wage. The parties do not challenge the Judge's finding that decedent earned \$340 in base wages.

Darlene Coffey, owner-operator of Super 8 Motel, testified that Super 8 Motel provided rooms to the workers while the work on the motel was being performed. The monetary value per night for a room was approximately \$80 based upon double occupancy. According to Ms. Coffey, she and Remodeling by David's David Garcia had a verbal agreement regarding the provision of motel rooms to the workers. She testified that was basically part of the bid and that the contractor's invoice represented the labor costs for performing the work.

The Workers Compensation Act defines wages as "the total of the money and *any additional compensation* which the employee receives for services rendered for the employer."¹ And additional compensation includes, among other items, board and lodging. K.S.A. 2004 Supp. 44-511(a)(2)(C) provides:

board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of \$25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved.

¹ K.S.A. 2004 Supp. 44-511(a)(3) (emphasis added).

But as the Kansas Court of Appeals explained in *Ridgway*,² not all payments made to an employee are considered wages. And in analyzing whether car and uniform allowances should be included as wages in computing an employee's average weekly wage, the Kansas Court of Appeals held that only those payments that represented a financial gain should be included in the average weekly wage. Conversely, those payments that were simply reimbursement for out-of-pocket work-related expenses did not constitute a financial or economic gain and, consequently, should not be included in the average weekly wage. The Kansas Court of Appeals held:

The evidence indicates that the \$225 car allowance that Harmon received from his employer represented a financial gain to Harmon and was not simply reimbursement for out-of-pocket work-related expenses. Consequently, the car allowance was properly included in the calculation of Harmon's average weekly wage under K.S.A. 44-511(a)(3). Regarding the uniform allowance, it is not clear whether Harmon used the entire \$35 to clean his uniform. Although an employee could spend the \$35 in any manner he chose, it is not clear that Harmon, in fact, spent the \$35 on something other than cleaning his uniform. Consequently, since the record does not affirmatively indicate the \$35 allowance constituted true economic gain for Harmon, the \$35 should not have been included in the calculation of Harmon's average weekly wage under K.S.A. 44-511(a)(3).³

But in *Jordan*,⁴ the Kansas Court of Appeals noted that board and lodging expenses should be treated differently from uniform and car allowances because K.S.A. 44-511(a)(2)(C) specifically included those expenses as additional compensation when they are furnished by the employer as part of the employee's wages. According to *Jordan*, the legislature implicitly decided that board and lodging expenses furnished by an employer as part of the employee's wages constitute economic gain to the employee. The Kansas Court of Appeals wrote:

The facts of *Ridgway* differ from those in the instant case because in *Ridgway*, there was no specific statutory provision relating to the allowances paid by the employer. Here, K.S.A. 44-511(a)(2)(C) specifically includes within "additional compensation" the board and lodging expenses that are "furnished by the employer as part of the wages." *By having this specific statutory provision, the legislature has implicitly decided that payments for board and lodging expenses, "when furnished by the employer as part of the wages," constitute economic gain*

² *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

³ *Id.* at 445.

⁴ *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258, 101 P.3d 239 (2004), *rev. denied* 279 Kan. 1006 (2005).

to the employee. Although Jordan received the \$15 per day payment separately from his paycheck, it is clear that this payment constituted part of his wages that he received for working in Oklahoma. As the Board points out, it is clear that the \$15 per day payment did constitute economic gain to Jordan because he would have had to pay for meals regardless of his employment.⁵ (Emphasis added.)

Judge Barnes included only one-half the value of the \$80 motel room in the decedent's average weekly wage because decedent shared the room with a co-worker. The Board affirms the Judge's finding that the decedent's average weekly wage includes \$280 for one-half the value of the motel room.

In *Jordan*, the Kansas Court of Appeals interpreted K.S.A. 44-511(a)(2)(C) as eliminating the need to analyze whether the furnishing of the motel room constituted an economic gain. The record, however, does establish that the decedent received an economic gain or benefit from having the motel room. The decedent resided in Mexico. Consequently, he required lodging to work in Winfield, Kansas. Because decedent had lodging provided by his employer, he was not required to obtain other lodging at his own expense.

In short, the Judge did not err by including one-half the value of the motel lodging, \$280 per week, in the decedent's average weekly wage. Adding decedent's \$340 per week base wage to the \$280 for lodging yields an average weekly wage of \$620.

Super 8 Motel and its insurance carrier request reimbursement of court reporter expenses they paid in this claim. The Judge assessed the court reporting expenses against the Fund. The Board affirms that order. Accordingly, the Fund should reimburse Super 8 Motel and its insurance carrier for those court reporting expenses they paid during litigation of the claim.

AWARD

WHEREFORE, the Board affirms the October 3, 2006, Award entered by Judge Barnes. In addition, the Board orders the Workers Compensation Fund to reimburse Super 8 Motel and its insurance carrier the court reporting expenses they paid during litigation of this claim.

The record does not contain a written fee agreement between the decedent's surviving spouse and her attorney. K.S.A. 44-536(b) requires written contracts for attorney

⁵ *Id.* at 275.

fees to be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

IT IS SO ORDERED.

Dated this ____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Guadalupe Perez Bucio
Jeffery R. Brewer, Attorney for Super 8 Motel Corporation and its Insurance Carrier
Kendall R. Cunningham, Attorney for Fund
Nelsonna Potts Barnes, Administrative Law Judge